WU SIYING & ORS v. MALAYSIAN AIRLINE SYSTEM BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN JC
[CIVIL SUIT NO: WA-21NCVC-20-03-2016]
8 SEPTEMBER 2016

CIVIL PROCEDURE: *Discovery – General discovery – Documents – Application for – Rules of Court 2012, O. 24 r. 3 – Information paucity – Whether documents in possession, custody or power of party against whom order for discovery sought – Whether discovery sought relevant for purposes of ascertaining liability – Whether claims made under Montreal Convention 1999 – Whether application a mere fishing expedition based on speculation – Application not accompanied by affidavit in support – Whether application failed on procedural point – Whether grounds for application baseless – Applicable test to determine whether discovery ought to be granted – Whether fulfilled*

The plaintiffs made an application for general discovery against the defendants pursuant to O. 24 r. 3 of the Rules of Court 2012. This case arose out of the disappearance of a Boeing 777 bearing the registration number 9M-MRO and flight code MH370 on 8 March 2014. The first defendant was the former operating entity of the national carrier, whose business had since been transferred to the second defendant pursuant to the Malaysian Airline System Berhad (Administration) Act 2015. The plaintiffs' application for general discovery was based on the following grounds (a) that the plaintiffs were in the position of information paucity, as all the documents pertaining to the disappearance of MH370 were in the possession, custody or power of the defendants; and (b) the plaintiffs had reason to believe that the defendants may dispose of, conceal or destroy such documents. The defendants, however, raised a number of different grounds in resisting the application for general discovery (i) that the first defendant had not yet elected whether to avail itself of a defence under art. 21(2) of the Montreal Convention 1999 ('Convention'), applied in Malaysia by virtue of the Carriage by Air Act 1974. The first defendant submitted that, until such time, the liability of a carrier for the death of a passenger under the Convention was strict, provided that it is shown that the accident which caused the death took place on board the aircraft or in the course of any of the operations of embarking or disembarking. The first defendant argued that until and unless the first defendant makes this election, discovery was not relevant or necessary, for the plaintiff did not have to prove the liability of the second defendant in order to be successful in its claim; (ii) that the plaintiffs' application was a mere fishing expedition, trawling for evidence to be used in support of their claims; (iii) the plaintiffs' application must fail on a procedural point, as the application was not accompanied by an affidavit in support; (iv) that the grounds for the plaintiffs' application were baseless.

Held (allowing application):

(1) The first defendant appeared to have reserved its position on whether the accident was not the result of any fault on its part, or was the result of the fault of a third party. The discovery sought would not be relevant or necessary for the purposes of ascertaining the liability of the first defendant; such liability was strict, and unless and until the first defendant amended its pleadings to state that the damage was not due to its negligence or other wrongful act or omission or that the damage was solely due to the negligence or other wrongful act or omission of a third party, discovery would not be relevant for the purposes of ascertaining the liability of the first defendant under the Convention. However, the plaintiffs also claimed against the third to fifth defendants: the Director-General of the Civil Aviation Department, the Royal Malaysian Air Force, and Government of Malaysia. These claims were not made under the Convention. Discovery could therefore be ordered against the first defendant in so far as they relate to documents that are relevant to the plaintiffs' case against the third to fifth defendants. Ordinary rules applicable in general civil proceedings apply in respect of the claims against the Government-related defendants. (paras 10 & 11)

(2) There were sufficient pleaded facts to show that the plaintiffs do in fact have a case that may be aided by an order of discovery, and that, as a consequence, the application for discovery was not a mere fishing exercise. By way of an example, the statement of claim narrated the following fact pattern: at 1:21:13 MYT on 8 March 2014 MH 370 disappeared from the civilian radar system operated by the Kuala Lumpur Flight Information Centre, which was supervised and controlled by the Department of Civil Aviation. At 2:15 MYT, the first defendant's operation control centre informed the Flight Information Centre that MH370 was able to exchange signals and that it was flying in Cambodian airspace, information was that now thought to be incorrect. This pattern showed that the plaintiffs' case was not mere speculation. In examining the relevancy or materiality of the plaintiffs' application for discovery to a fact in issue, the plaintiffs' case must be assumed to be true. (*Yekambaran Marimuthu v. Malayawata Steel Bhd*, refd). (paras 15-17)

(3) There was no requirement under O. 24 r. 3 of the Rules of Court 2012 for an application to depose an affidavit in support of an application for general discovery under O. 24 r. 3, unlike an application for specific discovery under O. 24 r. 7A. (para 20)

(4) The applicable test for determining whether or not discovery ought to be granted was that set out in *Yekambaran*'s case: there must be a "document", that document must be "relevant" and it must be or have

been in the "possession, custody or power" of the party against whom the order for discovery was sought. The plaintiffs' application fulfilled this test. None of the objections raised by the defendants could be sustained. (para 24)

Case(s) referred to:
Kenwood Electronics (Malaysia) Sdn Bhd v. People's Audio Sdn Bhd & Ors [2003] 5 CLJ 436 HC ***(dist)***
Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shan (T/A JB International) [1981] 1 LNS 204 HC ***(refd)***
WA Pines Pty Ltd v. Bannerman (1980) 30 ALR 559 ***(refd)***
Yekambaran Marimuthu v. Malayawata Steel Bhd [1994] 2 CLJ 581 HC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 24 rr. 3, 7A

For the plaintiffs - Tommy Thomas & Ganesan Nethi; M/s Tommy Thomas
For the 1st defendant - Saranjit Singh, Hoe Mei Lei & Dhiya Damia; M/s Saranjit Singh
For the 2nd defendant - Kumaran; M/s Sanjeev Kumar
For the 3rd-5th defendants - Alice Loke; SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Azizul Azmi Adnan JC:

Introduction

[1] The plaintiffs in this case made an application for both general and specific discovery against the defendants. In the course of oral submissions, Mr Tommy Thomas, learned counsel for the plaintiffs, deferred his application for specific discovery in encl. 11 until after the disposal of the application for general discovery in encl. 10. Accordingly, this judgment deals only with the application for general discovery.

[2] This case arises out of the disappearance of a Boeing 777 bearing the registration number 9M-MRO and flight code MH370 on 8 March 2014. The first defendant was the former operating entity of the national carrier, whose business has since been transferred to the second defendant pursuant to the Malaysian Airline System Berhad (Administration) Act 2015.

The Plaintiffs' Application

[3] The plaintiffs' application in encl. 10 was made pursuant to, *inter alia*, O. 24 r. 3 of the Rules of Court 2012, which is reproduced below for ease of reference.

> Order for discovery (O. 24, r. 3)
>
> 3.(1) Subject to the provisions of this rule and of rules 4 and 8, the Court may at any time order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to give discovery by making and

A serving on any other party a list of the documents which are or have been in his possession, custody or power and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party.

(2) (There is no paragraph (2))

B (3) (There is no paragraph (3))

(4) The documents which a party to a cause or matter may be ordered to discover under paragraph (1) are as follows:

(a) the documents on which the party relies or will rely; and

C (b) the documents which could –

(i) adversely affect his own case;

(ii) adversely affect another party's case; or

(iii) support another party's case.

D **[4]** The plaintiffs' application for general discovery cited the following grounds in support:

(a) that the plaintiffs are in the position of information paucity, as all the documents pertaining to the disappearance of MH370 were in the possession, custody or power of the defendants; and

E

(b) the plaintiffs have reason to believe that the defendants may dispose of, conceal or destroy such documents.

The Law Relating To Discovery

F **[5]** In order to succeed in their applications, the plaintiffs must establish the three essential elements identified by the Edgar Joseph Jr SCJ (delivering the judgment of the High Court) in *Yekambaran Marimuthu v. Malayawata Steel Bhd*[1]:

G The essential elements for an order for discovery are threefold; namely, first, there must be a "document", secondly, the document must be "relevant" and thirdly, the document must be or have been in the "possession, custody or power" of the party against whom the order for discovery is sought.

[6] Guidance as to whether a document sought is relevant is found in the H following passage of the Singapore High Court case of *Manilal & Sons (Pte) Ltd v. Bhupendra KJ Shan (T/A JB International)*[2]:

Under a general order of court for discovery, a party is obliged to make discovery of all documents relevant to the matters in question in the action. What are the matters in question would depend on the pleadings. A document relates to the matter in question in the action if it contains I information which may - not which must - either directly or indirectly enable the party requiring the discovery either to advance his own case or to damage the case of his adversary or which may fairly lead to a train

of inquiry which may have either of those two consequences: see *Compagnie Financiere et Commerciale du Pacifique v. Peruvian Guano Co* (1882) 11 QBD 55 at p 62. Documents relate to matters in question in the action so long as they are likely to throw light on the case: see *Merchants' & Manufacturers' Insurance Co Ltd v. Davies* [1938] 1 KB 196 at p 210.

[7] The defendants raised a number of different grounds for resisting the application for general discovery. I deal with these grounds in turn in the following paragraphs. Other grounds were also raised in submissions to resist the application for specific discovery. Since the application for specific discovery has been deferred by the plaintiff, I do not propose to deal with those other grounds here.

Whether Application Was Procedurally Wrong/Premature

[8] It is common ground that the liability of the first defendant is governed by the Montreal Convention 1999, applied in Malaysia by virtue of the Carriage by Air Act 1974. (As to whether it provides an exclusive cause of action against a carrier: see para. 12, post.)

[9] It was advanced for the first defendant that the application was in error as a matter of procedure and/or premature and that the discovery was not relevant for the purposes of ascertaining liability at this stage in the proceedings. Mr Saranjit for the first defendant argued that the first defendant had not yet elected whether to avail itself of a defence under art. 21(2) of the Convention. Until such time, the liability of a carrier for the death of a passenger under the Convention was strict, provided that it is shown that the accident which caused the death took place on board the aircraft or in the course of any of the operations of embarking or disembarking. In the present case, it is not in dispute that these preconditions (which are imposed under art. 17(1) of the Convention) have been fulfilled. Thus–argued Mr Saranjit–until and unless the first defendant makes this election (and amends its pleadings as a consequence), discovery is not relevant or necessary, for the plaintiffs do not have to prove the liability of the second defendant in order to be successful in its claim. Under art. 21(2), a carrier that disputes liability in excess of 133,000 SDRs[3] bears the burden of proving that the damage was not due to its negligence or other wrongful act or omission or that the damage was solely due to the negligence or other wrongful act or omission of a third party.

[10] Having examined the first defendant's defence, I am of the view that it has not pleaded that art. 21(2) applies. In other words, the first defendant appeared to have reserved its position on whether the accident was not the result of any fault on its part, or was the result of the fault of a third party. Therefore, I would agree with Mr Saranjit that, as currently pleaded, the discovery sought would not be relevant or necessary for the purposes of ascertaining the liability of the first defendant; such liability is strict, and unless and until the first defendant amends its pleadings to state that the

damage was not due to its negligence or other wrongful act or omission or that the damage was solely due to the negligence or other wrongful act or omission of a third party, discovery would not be relevant for the purposes of ascertaining the liability of the first defendant under the Convention.

[11] However, the plaintiffs also claim against the third to fifth defendants: the Director-General of the Civil Aviation Department, the Royal Malaysian Air Force, and Government of Malaysia. These claims are not made under the Convention. Discovery could therefore be ordered against the first defendant in so far as they relate to documents that are relevant for the plaintiffs' case against the third to fifth defendants. This is because the ordinary rules applicable in general civil proceedings apply in respect of the claims against the Government-related defendants. Liability for these defendants is not strict, and will have to be proven in the conventional manner, with the plaintiff having to bear the burden of proving its case.

[12] Mr Thomas for the plaintiffs also contended that there is a line of United States authorities for the proposition that the Convention does not oust or supersede, or does not completely oust or supersede, common law causes of action. I consider that it will not be necessary for me to answer this question at this stage in proceedings, as I have found that discovery may be ordered against the first defendant in respect of the plaintiffs' causes of action against the third to fifth defendants.

Whether The Plaintiffs Are Merely Fishing

[13] Both Ms Loke, Senior Federal Counsel appearing for the third to fifth defendants, and Mr Saranjit argued before me that the plaintiffs' application was a mere fishing expedition, trawling for evidence to be used in support of their claims. Such an application ought not be countenanced by the court:

> [T]he court would dismiss a plaintiff's application for discovery if it is of the view that the plaintiff was 'merely fishing for evidence to prop up his case' and to allow him discovery would be unduly oppressive to the party giving discovery - see *Leslie S Holmes v. Engineering Service Inc* [1993] 1 AMR 27 at p 36.[4]

[14] An explanation of what amounts to impermissible fishing is contained in the decision of the Federal Court of Australia, exercising its appellate jurisdiction, in *WA Pines Pty Ltd v. Bannerman*[5]:

> Though the power to require discovery be acknowledged, how should it be exercised? It depends upon the nature of the case and the stage of the proceedings at which the discovery is sought. In the present case, discovery is sought before there is a title of evidence to suggest that the Chairman did not have the requisite cause to believe which para 6 of the statement of claim would put in issue. Some assistance was sought to be derived from cases where discovery had been given to a party before he was required to give particulars of his claim: cases such as *Ross v. Blake's Motors* [1951] 2 All ER 689, but in cases of that kind there is either an

anterior relationship between the parties which entitles one to obtain information from the other, or *sufficient is shown to ground a suspicion that the party applying for discovery has a good case proof of which is likely to be aided by discovery*. This is not such a case. *This is a case where a bare allegation is made by para 6 of the statement of claim and, the paragraph being denied, the applicant seeks to interrogate the Chairman and ransack his documents in the hope of making a case. That is mere fishing*. As Smithers J said in *Melbourne Home of Ford Pty Ltd v. Trade Practices Commission*, *supra* (5 TPC at 35; ATPR at 18,087: "In the absence of such evidence the proceeding is essentially speculative in nature. In such circumstances for the Court to assist the applicants by making available to them the processes of interrogatories and discovery would be to assist them in an essentially fishing exercise and from this the Court on established principles should refrain". His Honour's refusal of discovery was right and it ought not to be disturbed.

(emphasis added)

[15] Having examined the statement of claim of the plaintiffs, I am of the view that there are sufficient pleaded facts to show that the plaintiffs do in fact have a case that may be aided by an order of discovery, and that, as a consequence, the application for discovery is not a mere fishing exercise.

[16] By way of example, the statement of claim narrates the following fact pattern: at 1:21:13 MYT on 8 March 2014 disappeared from the civilian radar system operated by the Kuala Lumpur Flight Information Centre, which is supervised and controlled by the Department of Civil Aviation. At 2:15 MYT, the first defendant's operation control centre informed the Flight Information Centre that MH370 was able to exchange signals and that it was flying in Cambodian airspace, information that is now thought to be incorrect (based on the preliminary report on the accident issued by the Ministry of Transport). Despite the fact that the last contact with MH370 was at approximately 1:20 MYT, the Flight Information Centre only activated the Kuala Lumpur Aeronautical Rescue Co-ordination Centre at 5:30 MYT, which in turn only issued a distress message for MH370 approximately one hour later.

[17] In my judgment, this fact pattern shows that the plaintiffs' case is not mere speculation. In examining the relevancy or materiality of the plaintiffs' application for discovery to a fact in issue, the plaintiffs' case must be assumed to be true: see *Yekambaran*'s case, *op. cit.*, where His Lordship cited with approval the following passage from *The Principles and Practice of Discovery* by Edward Bray:

… for the purpose of testing the materiality of the discovery to a particular issue… it is the case of the party seeking the discovery that must be assumed to be true, and not that of the party from whom the discovery is sought.

[18] The case of *Kenwood Electronics (Malaysia) Sdn Bhd v. People's Audio Sdn Bhd & Ors*[6] was cited in support for the contention that the plaintiffs' application for discovery ought to be dismissed. In my view, that case can be distinguished on the facts. The ratio of that case is that no discovery ought to be ordered if the effect of compelling the defendants to disclose and produce the documents sought would be to reverse the legal burden of proof. In the present instance, compliance with an order for general discovery would not have such an effect.

No Affidavit In Support

[19] The first defendant contended that the plaintiffs' application must fail on a procedural point, as the application was not accompanied by an affidavit in support.

[20] In my judgment, there is no requirement under O. 24 r. 3 of the Rules of Court 2012 for an applicant to depose an affidavit in support of an application for general discovery under O. 24 r. 3, unlike an application for specific discovery under O. 24 r. 7A. In any event, the plaintiffs have filed a notice of their intention to refer to the relevant supporting and reply affidavits that had been filed in connection with the application for specific discovery (which application the plaintiffs have now deferred).

Whether Grounds For Application Baseless

[21] Ms Loke for the third to fifth defendants contended that the grounds upon which the plaintiffs sought discovery were without basis. According to her, there are ample facts contained interim statement dated 8 March 2015 issued by the Malaysian International Civil Aviation Organisation Annex 13 Safety Investigation Team for MH370, which was appended as an exhibit in encl. 24. Thus, according to counsel, the plaintiffs have not in a position of information paucity.

[22] In my judgment, apart from the interim statement, all relevant information that could possibly be used to determine the liability of the defendants are or should be in the possession, custody or power of the defendants. Of course, the interim statement itself would not be sufficient for the plaintiff to proceed to trial. For instance, original documents will need to be adduced for the purposes of compliance with the rules of evidence.

[23] The second ground advanced by the plaintiffs contend that the defendants are likely to dispose of or conceal or destroy documents relating to the subject matter of this suit. Here, I am in agreement with Ms Loke that there is no credible evidence to substantiate this concern.

[24] Nonetheless, the applicable test for determining whether or not discovery ought to be granted is that set out in *Yekambaran*'s case: there must be a "document", that document must be "relevant" and it must be or have

been in the "possession, custody or power" of the party against whom the order for discovery is sought. I am of the view that the plaintiffs' application fulfils this test. None of the objections raised by the defendants could be sustained, for the reasons that I have explained above.

[25] Application allowed, with costs to be in the cause.

Endnote:

1. [1994] 2 CLJ 581.
2. [1981] 1 LNS 204; [1990] 2 MLJ 282.
3. special drawing rights, which is best understood as a notional currency whose value is determined by reference to a basket of currencies.
4. *Nguang Chan aka Nguang Chan Liquor Trader & Ors v. Hai-O Enterprise Bhd & Ors* [2009] 5 MLJ 40 (CA).
5. (1980) 30 ALR 559.
6. [2003] 5 CLJ 436; [2003] 5 MLJ 276.